RECORD AND BRIEFS

Nos. 17-71, 17-74

FILED
AUG 14 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SAN JUAN COUNTY, UTAH IN SUPPORT OF PETITIONERS

SHAWN T. WELCH
HOLLAND & HART, LLP
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101
T (801) 799-5800
F (801) 799-5700
stwelch@hollandhart.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Plain Language Of The Statute Requires The Designated Land To Actually Be Habitat 6

II. The Service Must Analyze And Quantify The Economic Impacts Of Designating Land As Critical Habitat 7

CONCLUSION 8

APPENDIX ..... App. 1

TABLE OF AUTHORITIES – Continued

Page

CASES

Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 344 F. Supp. 2d 108 (D.D.C. 2004) 6, 7

Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al., Civil No. 1:15-cv-130 (D. Colo.) 4

STATUTES AND RULES

5 U.S.C. §§ 551 *et seq.* 4

16 U.S.C. § 1532(5)(A)(i) 6

16 U.S.C. § 1532(5)(A)(ii) 7

16 U.S.C. § 1533(b)(2) 7, 8

Administrative Procedure Act 4

Endangered Species Act 4, 5, 6, 7

Supreme Court Rule 37.2 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

50 C.F.R. § 424.12(a) 8

50 C.F.R. § 424.14(b)(5) 6

49 Fed. Reg. 38900, 38907 (Oct. 1, 1984) (preamble to rule codified at 50 C.F.R. § 424) 8

79 Fed. Reg. 69311 (Nov. 20, 2014) 2, 5, 6

STATEMENT OF INTEREST OF *AMICUS CURIAE*

San Juan County[1] spans 6.2 million acres and is the largest county in the State of Utah. San Juan County is pretty much the same size as the entire State of Massachusetts. However, over 80% of the land in San Juan County is owned by the United States outright, or managed as reservation or restricted land, leaving only 405,000 acres (8%) of private, taxable land in the county. The small percentage of private land in San Juan County is primarily located along Utah's eastern border with the State of Colorado and largely involves family farms, ranches and agricultural lands that are the mainstay of San Juan County's rural economy.

---

[1] Pursuant to Rule 37.2, all parties with counsel of record on the docket have consented to the filing of this brief. *Amicus Curiae* decided to file this brief less than ten days before the due date and therefore did not obtain written consent to this filing more than ten days in advance. However, counsel for Respondent U.S. Fish and Wildlife Service provided written consent to this filing, as did counsel for Respondent Center for Biological Diversity. The written consents of Respondents have been filed with the Clerk of the Court. Counsel for Petitioners provided written consent to the filing of *amicus curiae* briefs as shown by docket entry dated July 18, 2017.

Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

In 2014, the U.S. Fish and Wildlife Service (Service) promulgated two companion regulations that listed the Gunnison sage-grouse as a threatened species, and then designated 1.4 million acres of occupied and unoccupied critical habitat in both Colorado and Utah. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Gunnison Sage-Grouse; Final Rule, 79 Fed. Reg. 69311 (Nov. 20, 2014). True to the Gunnison sage-grouse's name, sagebrush is the Primary Constituent Element (PCE) of Gunnison sage-grouse habitat. More than just patches of sagebrush, the Gunnison sage-grouse requires vast expanses of sagebrush interspersed with meadows and specific herbaceous forbs for feeding and breeding.

When the Service designated the occupied and unoccupied critical habitat for the Gunnison sage-grouse in 2014, it very much avoided designating its own federal lands in San Juan County – there were millions of federal sage-brush-covered acres at its fingertips to choose from – but the Service drew gerrymandered boundaries that excluded its own federal land. *See* Appendix. As a general matter, the white colored areas in the included habitat map of Utah are federal lands that the Service chose not to designate as critical habitat for the Gunnison sage-grouse. With the understanding that there is no wall between Utah and Colorado, it is plain to see that the habitat boundaries drawn by the Service very much reacted to political, not species, boundaries. With the understanding that

nature abhors a straight line, there is no rational reason for the Service's exclusion of Montezuma County, Colorado, or the southern part of San Juan County.

The tens of thousands of acres of unoccupied habitat between the Colorado state line and Monticello, Utah, are not "habitat" acres, but are generally farmlands, agricultural lands and even whole towns. Over the vigorous objections of San Juan County and others, the Service proceeded to designate 146,000 acres of mostly private land in San Juan County as "critical habitat" that was "essential" for the recovery of the species.

As it now stands, the Service designated **35% of all the private land in San Juan County** as critical habitat for the Gunnison sage-grouse. The unoccupied private land that the Service determined to be critical habitat "essential" to the recovery of the Gunnison sage-grouse is overwhelmingly cultivated hay farm and agricultural land. Those farmers do not grow sage brush, nor is there any reasonable expectation that they will in the future.

There is not even a gambling chance that the Service took a meaningful step toward the recovery of the Gunnison sage-grouse by designating tens of thousands of acres of private agricultural lands and hay farms as critical habitat for the species. Equally, there is not even a gambling chance that the Service took a meaningful step toward the recovery of the dusky gopher frog by designating 1,500 acres of unoccupied private land in Louisiana as critical habitat.

San Juan County is now an intervenor-plaintiff in a lawsuit against the Service challenging its designation of critical habitat for the Gunnison sage-grouse. *See Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*, Civil No. 1:15-cv-130 (consolidated) (D. Colo.). This lawsuit is in the early briefing stage, meaning that this Court's review and decision of the issues presented by the Petition for a Writ of Certiorari of Markle Interests, LLC (Pet.) will have effect in other pending litigation.

SUMMARY OF ARGUMENT

The Service is a federal agency and federal agency actions are subject to judicial review under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 *et seq*. Petitioner Markle Interests, LLC, presented the Court with the background facts and law at issue under the Endangered Species Act (ESA). San Juan County, as *Amicus Curiae*, does not seek to repeat or duplicate the legal issues and arguments presented, but attempts to inform the Court of other circumstances and ongoing litigation that may be affected by this Court's review. Simply stated for the Court, the Service internally decides when it needs to find more acres – not actual habitat, just more acres – to call habitat. The Service randomly found more acres for the dusky gopher frog in Louisiana. A couple of years later, the Service decided it needed to find more acres for the Gunnison sage-grouse in San Juan County. It did so by randomly designating a large number of farms and ranches in

San Juan County as unoccupied, but somehow essential, habitat for the Gunnison sage-grouse. The Service does not really expect to create or provide habitat for the species on the designated private land, which raises the question of whether its action was arbitrary, capricious or an abuse of discretion.

ARGUMENT

"For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species." Pet. 18. The Markle Interests private lands were designated in 2012. Two years later, the Service designated tens of thousands of acres of private land in San Juan County as unoccupied critical habitat for the Gunnison sage-grouse. The Service did so even though most of the land is entirely uninhabitable by the grouse and has no viable chance to become habitat for the species. In designating the private farmland as expected habitat, the Service acknowledged the problem. "Unoccupied lands are designated here because they are 'essential for the conservation of the species' and these areas do not stop at land ownership boundaries." 79 Fed. Reg. at 69321. "We recognize that in areas with a high proportion of private ownership and with more intensive land uses (such as agriculture), the conservation of these populations will be more difficult than in less developed areas." *Id.*

This carefully crafted administrative language admits that the Service does not control the uses of private land, but hopes that others will follow along. "Our landscape level approach used in this critical habitat designation generally does not consider land ownership." 79 Fed. Reg. at 69321.

I. The Plain Language Of The Statute Requires The Designated Land To Actually Be Habitat.

Congress never authorized the Service to designate random land or water for the conservation of any species. Rather, it authorized the agency to designate "habitat." Critical habitat under the ESA, by definition, includes only the "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The "physical or biological features" that satisfy the ESA's requirements are termed Primary Constituent Elements (PCE). 50 C.F.R. § 424.14(b)(5). PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). "That PCEs must be 'found' on an area is a prerequisite to designation of that area as critical habitat." *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004). The Service is prohibited from over-designating habitat and must instead "mount[] the proper effort to

ensure that PCEs do exist on designated lands." *Id.* at 122-23. "The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation." *Id.*

Equally, unoccupied lands must provide "critical habitat" that is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). By the plain language of the statute, beyond providing habitat and habitat that is critical, the unoccupied lands must be "essential" for the conservation of the species.

And so it is that separate from the Service's desire to find more acres – any acres will do – the plain language of the statute requires that unoccupied areas of critical habitat must be 1) habitat suitable for the species, 2) critical, which is something more than general or potential, and 3) essential, being necessary. With these congressional words of limitation in mind, it is impossible to say that uninhabitable land in Louisiana is essential, critical or even habitat for the dusky gopher frog.

II. The Service Must Analyze And Quantify The Economic Impacts Of Designating Land As Critical Habitat.

Section 4(b)(2) of the ESA requires the Service to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C.

§ 1533(b)(2). If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from designation if doing so would not result in the listed species' extinction. *Id.* The regulations clarify that the designation is to be made "after taking into consideration the probable economic and other impacts." 50 C.F.R. § 424.12(a). The "economic and other impacts resulting from the designation of critical habitat will cover all activities affecting or affected by the proposed critical habitat designation." 49 Fed. Reg. 38900, 38907 (Oct. 1, 1984) (preamble to rule codified at 50 C.F.R. § 424). As presented by Markle Interests, the Service failed to address the economic benefits (or detriments) of designating uninhabitable land as critical habitat.

CONCLUSION

For the foregoing reasons, San Juan County respectfully requests the Court to grant the Markle Interests, LLC, Petition for a Writ of Certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

SHAWN T. WELCH
HOLLAND & HART, LLP
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101
T (801) 799-5800
F (801) 699-5700
stwelch@hollandhart.com

Counsel for Amicus Curiae

Gunnison Sage-grouse Critical Habitat
Unit 1: Monticello-Dove Creek

San Juan County, Utah; Montrose, San Miguel, and Dolores Counties, Colorado